No. 18-96

In the
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT AFFLUERE INVESTMENTS, INC.

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae are law professors and experts in the field of constitutional law. Each has published works commenting on the Fourteenth Amendment and the Privileges or Immunities Clause specifically.

Amici submit this brief to elucidate the original public meaning of the Fourteenth Amendment's Privileges or Immunities Clause. Read in light of that meaning, the Clause prohibits states from circumscribing the property and contract rights of United States citizens based on duration of state residency. *Amici* urge this Court to apply the Privileges or Immunities Clause according to its original meaning and invalidate the Tennessee residency requirements at issue in this case.

The signatories to the brief are as follows:

Professor Emeritus Richard L. Aynes, The University of Akron School of Law.

Professor James W. Ely, Jr., Vanderbilt University Law School.

Professor Richard A. Epstein, New York University School of Law.

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[*] Petitioner's and respondents' letters giving blanket consent to amicus briefs are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

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SUMMARY OF ARGUMENT

This case concerns whether a State may forbid United States citizens from plying a lawful trade based purely on the duration of their in-state residency. Tennessee law permits the retail sale of alcohol by anyone holding a state-issued retailer's license. *See* Tenn. Code Ann. § 57-3-204. But the law restricts both the grant and renewal of such licenses based on the duration of an applicant's Tennessee residency. *See id.* §§ 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D). The Sixth Circuit held that those restrictions violate the negative (also known as the dormant) Commerce Clause and severed them from the rest of the statute. *See Byrd v. Tenn. Wine & Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018). The court did not reach the separate issue of whether the duration-of-residency provisions *also* violate the *Privileges or Immunities Clause* of the Fourteenth Amendment.

Unfortunately, "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of [this Court's] Fourteenth Amendment jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (THOMAS, J., dissenting). As originally understood, the Privileges or Immunities Clause prohibits the duration-of-residency provisions at issue in this case. *Amici* submit this brief to explain why the Court can affirm the Sixth Circuit on that distinct and "more straightforward" basis. *McDonald v. City of Chicago*, 561 U.S. 742, 820 (2010) (THOMAS, J., concurring in part and concurring the in judgment).

The "original public meaning" of the Privileges or Immunities Clause should direct this Court's judicial decisionmaking. *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (THOMAS, J., concurring). The Clause protects those "*fundamental* rights that belong to all citizens of the United States." *Saenz*, 526 U.S. at 526 (THOMAS, J.). Under our federal system, that order of rights doubtless includes all state-recognized *civil* rights necessary for "the enjoyment of life and liberty," including rights "to acquire and possess property" consistent with local law. *McDonald*, 561 U.S. at 820 (Thomas, J.) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825)). The Privileges or Immunities Clause thus requires that each State extend to *all* United States citizens the *same* contract and property rights enjoyed by citizens generally under state law, irrespective of residency duration.

As United States citizens who have recently moved to Tennessee, Douglas and Mary Ketchum are entitled to the protections of the Privileges or Immunities Clause. Were Tennessee to deny the Ketchums an alcohol retailer's license solely on duration-of-residency grounds, it would be stripping them of contract and property rights afforded to other Tennesseans. Such an act would clearly abridge the Ketchums' fundamental rights as United States citizens and, in so doing, would violate the Privileges or Immunities Clause.

ARGUMENT

I. The Fourteenth Amendment's Privileges Or Immunities Clause Protects The Fundamental Rights Of United States Citizenship.

Provisions of the Constitution must be interpreted by reference to their original public meaning. *E.g.*, *Lucia*, 138 S. Ct. at 2056 (THOMAS, J., concurring). Read according to its original public meaning, the Privileges or Immunities Clause prohibits states from abridging the *fundamental rights* of United States citizenship.

Prior to the Civil War, citizenship was primarily a local, rather than a national, concern. *See* Richard White, *The Republic for Which It Stands* 59 (2017); James E. Bond, *No Easy Walk to Freedom* 216 (1997). To be sure, a person could be a "Citizen of the United States." *See* U.S. Const. art. II, § 1, cl. 5. But antebellum Americans considered "the United States" a plural collective, rather than a fully cohesive whole. People "commonly said ... 'the United States *are*," instead of the now-common "is." White, *supra*, at xvii. Consistent with this understanding, one achieved *national* citizenship only through *local* citizenship—that is, by birthright or naturalization in one of the states or territories. *Cf. Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) ("Every citizen of the United States is also a citizen of a State or territory.").

With the adoption of the Fourteenth Amendment, however, the reverse became true. The Amendment's first sentence declared that "[a]ll persons born or naturalized in the United States ... are citizens of the

United States and of the State wherein they reside." *See* U.S. Const. amend. XIV, § 1. This provision "significantly altered our system of government" by binding the states to respect all *national* citizens within their borders. *McDonald*, 561 U.S. at 807 (THOMAS, J.).

Never had that shift been more necessary. Though the Thirteenth Amendment had formally abolished slavery, it had not explicitly recognized freedpeople as members of the body politic. Another amendment was necessary to overrule "[p]erhaps the most fundamental holding" of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), "that 'blacks' were not 'African-Americans'—they were persons of African descent who lived in America, but they could never truly be called Americans." Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 Chi.-Kent L. Rev. 49, 55 (2007). That opinion had "used citizenship as the central dividing line between those who possess basic rights and those who did not." *Id.* at 56. Accordingly, the Fourteenth Amendment "unambiguously overruled" *Dred Scott* and "recognize[d] black Americans as" citizens of the United States. *McDonald*, 561 U.S. at 807–08 (THOMAS, J.).

That citizenship meant very little, however, unless it worked as a shield against the "nearly absolute" authority states still exercised over their inhabitants. Robert J. Cottrol, *Reconstruction Amendment Historiography: The Quest for Racial and Intellectual Maturity*, 23 Rutgers L.J. 249, 252 (1992). The abolition of slavery notwithstanding, the states retained the myriad residual powers not delegated to

the national government, *see* U.S. Const. amend. X, allowing them to control most of the critical matters of everyday life. The Union's victory in the war thus required a "Second Founding" to revise antebellum federalism. Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. Pa. J. Const. L. 1269, 1270 (2009).

As part of that project, the Fourteenth Amendment's second sentence gave meaning to national citizenship by protecting its "privileges" and "immunities" from state abridgement. U.S. Const. amend. XIV, § 1. Although the text does not identify those privileges and immunities explicitly, the phrase was never the enigma some have made it out to be. *See* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1074 (2000). By careful review of the text, context, and history of the Privileges or Immunities Clause, this Court can discern and apply that meaning. All three of those guides show that, in prohibiting state abridgment of the "privileges or immunities" of national citizens, the Privileges or Immunities Clause bound the states to respect certain *fundamental* rights.

The Court should "begin, as always, with the text." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (THOMAS, J.). Though less commonplace now, nineteenth-century readers would have understood the words "privileges" and "immunities" to simply mean "rights." *See, e.g.*, Akhil Reed Amar, *The Bill of Rights* 165–69 (1998); Curtis, *Historical Linguistics*, *supra*, at 1094–1138; *see generally*

McDonald, 561 U.S. at 813–22 (giving a full account of original public meaning). And "these were not simply lawyers' terms." Richard L. Aynes, *Ink Blot Or Not: The Meaning of Privileges and/or Immunities*, 11 U. Pa. J. Const. L. 1295, 1298 (2009). Indeed, they were "part of the public understanding of the era." *Id.* Thus, in the eyes of the public at the time of enactment, the Clause quite literally guaranteed "United States citizens a certain collection of rights ... attributable to that status." *McDonald*, 561 U.S. at 808 (THOMAS, J.).

Of course, determining what specific rights fall into that collection requires a broader view of context and history. "Look[ing] to history" reveals that this practice of guaranteeing certain fundamental rights by law was in accord with deep-rooted Anglo-American legal tradition. *Saenz*, 526 U.S. at 522 (THOMAS, J.). According to that tradition, government existed primarily—if not exclusively—to preserve certain natural and inalienable rights. *See, e.g.*, The Declaration of Independence para. 2 (U.S. 1776). In safeguarding those rights and their necessary components *legally*, free governments solidified the "'privileges' or 'immunities' of citizenship." *Mcdonald*, 561 U.S. at 815 (THOMAS, J.); *see* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 632 (2001); *Bond*, *supra*, at 256. A reference to the "privileges and immunities of citizenship" thus connoted not only basic protections of "life, liberty, and the pursuit of happiness," but also the "facilitators" of such rights, including enforcement of property and contract interests. *See* Bond, *supra*, at 255.

By the 1860s, Americans had long been securing such privileges and immunities through written constitutions—whether colonial, state, or national. *See Saenz*, 526 U.S. at 522–24 & nn.2–3 (THOMAS, J.). Read against that textual and historical backdrop, the Fourteenth Amendment's reference to the "privileges" and "immunities" of national citizenship naturally refers to the fundamental rights secured through the nation's federal system of government. Those rights include not only the protections against government power contained in the Bill of Rights, but also the vast reservoir of state-secured citizenship rights guaranteed through the Constitution's establishment of the federal structure. *See* U.S. Const. art. I, § 10 (specific prohibitions on state power); *id.* art. IV, § 2, cl. 1 (guaranteeing interstate comity in the "privileges and immunities" of citizenship); *id.* § 4 (guaranteeing a "Republican Form of Government" in every state).

The drafters' decision to borrow language from the "Comity" Clause of Article IV further supports this view. This textual "link ... is not accidental." Aynes, *supra*, at 1299. Given the obvious similarities between the two provisions, "it can be assumed that the public's understanding of the [Privileges or Immunities Clause] was informed by its understanding of the [Comity Clause]." *McDonald*, 561 U.S. at 819 (Thomas, J.).

Importantly, the Constitution's original reference to the "privileges and immunities" of citizens had, by the 1860s, been "famously" interpreted to incorporate the traditional common law view of fundamental citizenship rights, which had always been enjoyed by the citizens of the several states. *Id.* (THOMAS, J.); *see*

Saenz, 526 U.S. at 524–26 & nn.4–6; Amar, *The Bill of Rights*, *supra*, at 176. Writing for his Circuit Court in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825), Justice Bushrod Washington had explained that Article IV demanded interstate comity in "those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and *which have, at all times, been enjoyed by the citizens of the several states which compose this Union*, from the time of their being free, independent, and sovereign." 6 F. Cas. at 551 (emphasis added). Though too "tedious" to list, those rights included at least "the enjoyment of life and liberty," consistent with local law, as well as the rights needed to "take, hold and dispose of property." *Id.* at 551–52. So prevalent was the *Corfield* opinion that "[w]hen Congress gathered to debate the Fourteenth Amendment, Members frequently, if not as a matter of course, appealed" to Justice Washington's understanding of the privileges and immunities of citizenship. *Saenz*, 526 U.S. at 526 (THOMAS, J., dissenting). Indeed, they argued "that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified." *Id.*

Importantly, the fundamental rights Justice Washington identified were not all *enumerated* in the Constitution. Though the text mentioned some of them directly, others were protected indirectly through guarantees of interstate comity and *intra*state republican government. *Cf.* Balkin & Levinson, *supra*, at 57 (explaining the fundamental rights view of the Comity Clause shared among the drafters of the Fourteenth Amendment). In fact,

"Justice Washington's enumerations of privileges was largely drawn from the declaration of rights in state constitutions of the Revolutionary era." James W. Ely, Jr., *Buchanan and the Right to Acquire Property*, 48 Cumb. L. Rev. 423, 429 (2018).

The contemporaneous debates confirm that the Clause acted as a bulwark to stop states from trampling over these fundamental rights of the newly freedpersons. Whether or not they indicate legislative *intent*, "[s]tatements by legislators can ... demonstrate the manner in which the public used or understood a particular word or phrase.'" *McDonald*, 561 U.S. at 828 (THOMAS, J.); *see also* Curtis, *Historical Linguistics*, *supra*, at 1146. This is especially true when evidence indicates "that those statements were disseminated to the public." *McDonald*, 561 U.S. at 828. With respect to the Privileges or Immunities Clause, a broad range of public debate shows widespread understanding that it prohibited states from encroaching on any fundamental right of citizenship. *See* Amar, *The Bill of Rights*, *supra*, at 226; *cf.* Curtis, *Historical Linguistics*, *supra*, at 1146.

To begin, two "particularly significant" congressional speeches—one from Representative John Bingham and the other from Senator Jacob Howard—adopt this interpretation. *McDonald*, 561 U.S. at 829 (Thomas, J.). Bingham sponsored the Amendment in the House of Representatives. *E.g.* Michael Kent Curtis, *No State Shall Abridge* 57 (1986). It is telling that his first draft hewed closely to the language of Article IV. *See* Cong. Globe, 39th Cong., 1st Sess. 1089, 1091 (1866). More telling, though, is Bingham's description of the privileges and

immunities referred to in Article IV as the privileges and immunities of citizens *of the United States*. *See id.* at 1089, 1093, 1095. Indeed, Bingham urged his colleagues that the Fourteenth Amendment would *perfect* the Constitution by "securing to all the citizens *in every State* all the *privileges and immunities of citizens*" generally. *Id.* at 1090. The Clause was therefore crucial—and distinct from the Comity Clause—because it prevented states from discriminating against *their own citizens* in the fundamental rights of citizenship. *See id.* at 1094.

Howard, who managed the final bill in the Senate, *see* Curtis, *No State Shall Abridge*, *supra*, at 91, described its ultimate wording in a similar way. Though the Clause had by then taken on a clearer reference to *national* citizenship, *see* Cong. Globe, *supra*, at 2764, Howard affirmed Bingham's earlier conception of the privileges and immunities inherent in that status. *See id.* at 2765; *cf. Corfield*, 6 F. Cas. at 551 (interpreting the language to refer to "fundamental" rights "which belong ... to the citizens of all free governments").

Moreover, in further defining that class of rights, Howard explicitly referred to the Bill of Rights and Justice Washington's opinion in *Corfield*. *See* Cong. Globe, *supra*, at 2764. Thus, Howard explained, "[t]he great object of the first section of this amendment is ... to restrain the power of the States and compel them at all times to respect these great *fundamental* guarantees." *Id.* at 2766 (emphasis added). As pertained to Reconstruction, this provision "protect[ed] the black man in his *fundamental rights as a citizen*," that is, "those *fundamental rights* lying

at the basis of all society." *Id.* (emphasis added). Indeed, Howard saw this as the very definition of "republican government," *id.*, which the Constitution guaranteed in every state, *see* U.S. Const. Art. IV, § 4.

Those outside of Congress adopted Bingham and Howard's views. In the Southern ratification debates specifically, representatives for and against the Amendment shared a common understanding that it would protect the "natural" and "inalienable" rights of free persons, Bond, *supra*, at 255, "and the civil rights necessary to their exercise," *id.* at 9. *See id.* at 54 (North Carolina), 136 (South Carolina), 199 (Arkansas), 224 (Texas). Indeed, "[t]he evidence is ... overwhelming that the privileges and immunities clause was ... understood to [reach] those civil rights which persons needed in order to protect and exercise their natural rights" of life, liberty, and the pursuit of happiness. Bond, *supra*, at 257. Those rights, contemporaries believed, constituted the core privileges and immunities of citizenship under the free government of the United States. *See id.* at 255.

Thus, the text, context, history, and contemporaneous debate all point to a singular conclusion: The Privileges or Immunities Clause protects the fundamental rights of United States citizenship from state government interference.

II. The Fundamental Rights of United States Citizenship Include All Rights Of Contract And Property Guaranteed To Citizens Under State Law.

The same textual, contextual, and historical clues just discussed further fix the rights of national citizenship to include *all* contract and property rights recognized under state law. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (looking to history to fix the parameters of the right to bear arms).

By the close of the Civil War, it had become apparent to the nation's leaders that true emancipation required abolition "not in form only, but in substance." Cong. Globe, *supra*, at 91; *see* Eric Foner, *Reconstruction* 251 (Updated ed. 2014). Accordingly, the new constitutional right to be free from slavery required complementary legal protections, Foner *supra*, at 29; *see also, e.g.*, Cong. Globe, *supra*, at 1094 ("Restore those States with a majority of rebels to political power, and ... the disenfranchised colored citizens will be utterly powerless."), necessitating nationwide establishment of a new *economic* freedom through basic civil rights. White, *supra*, at 60–61. In other words, the rights of freedpeople had to include "those rights essential for ... enter[ing] the world of contract, to compete on equal terms as free laborers." Foner, *supra*, at 244; *see* Cong. Globe, *supra*, at 588–89; White, *supra*, at 66; *see also* White, *supra*, at 57 ("As long as the Radicals emphasized the larger Republican goals of nationalism, free labor, and contract freedom, they could exert tremendous influence.").

Yet "the South was not prepared to accord ... general liberties to the newly emancipated black population." Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 343 (1991). Indeed, the Confederate fight against abolition had already morphed into a new, subtler *legal* effort to "maintain control over the former slaves." *Id.* at 344. Throughout the South, state governments enacted so-called "Black Codes," aiming "to stabilize the black work force and limit its economic options apart from plantation labor." Foner, *supra*, at 199. In the main, these laws limited or outright denied newly freed slaves' movement, as well as their contract and property rights. Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 31 (1996); *cf.* White, *supra*, at 81 ("What was developing in the South was a coercive labor system, which ... depended on extralegal violence, coercive laws, burdensome debt relations, and the use of convict labor to limit alternatives."). Contemporary observers noted that the Black Codes at once mandated employment, *see* Cong. Globe, *supra*, at 588–89, 1691, 1124, and imbued employers and state governments with the powers of slave master. In addition to punishing "vagrancy" by forced labor, the Codes restricted or outright denied the freedpeople's ability to travel, *id.* at 516, 651, buy or rent real estate, *id.* at 517, 589, 1838, buy and sell goods, *id.* at 517, 589, or otherwise engage in business, Bond, *supra*, at 3.

Although this was predominantly a Southern phenomenon, it was not confined there. "[M]any Northern states, though they banned slavery, had discriminated against free blacks." Curtis, *Resurrecting*, *supra*, at 32. Several Midwestern and Western states had even closed their borders to blacks entirely, fearing an impending migration. Foner, *supra* at 26.

Because states retained power over local matters of property and contract, undoing this system of de facto slavery required broad national restrictions on traditional state prerogatives. *See* Cottrol, *Reconstruction Amendment Historiography*, *supra*, at 252. Congress had thus proposed the Fourteenth Amendment, at least in part, as a *constitutional* enforcement of the Civil Rights Act of 1866. White, *supra*, at 73; *see* Report of the Joint Committee on Reconstruction 15 (1866).

Nowhere was that clearer than in the Privileges or Immunities Clause. Indeed, "the very notion of civil rights refers historically to the rights of citizens." Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. Civ. Rts. L.J. 1, 26 (2008). Thus, "[a] provision guaranteeing the privileges or immunities of citizens [was] ... a ... natural way to constitutionalize an act protecting civil rights." *Id.* At least those debating ratification understood it as such. Bond, *supra*, at 124; *see id.* at 57–58.

The Civil Rights Act thus provides a window into the sort of *state-based, civil rights* included in the fundamental rights of national citizenship. In fact, Representative "Bingham believed that the Act did

nothing more than ... state [those] rights." Zietlow, *supra*, at 1283. Importantly, the Act did so through a detailed list of specific protections, rather than by general reference. After granting freedpeople national citizenship in language similar to the Fourteenth Amendment, the Act preserved for "such citizens ... the same right, in every State and Territory in the United States, *to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.*" Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added).

This passage thus serves to spell out the implications of applying the Privileges or Immunities Clause to *intra*state citizenship rights. As free governments, the states all granted their citizens the civil rights necessary to preserve life, liberty, and property. *See Corfield*, 6 F. Cas. at 552. In granting these privileges and immunities of citizenship, the states now had to grant them to *all United States citizens equally*. *See* Civil Rights Act of 1866, § 1; *see generally* Green, *supra* (explaining that the Privileges or Immunities Clause, not the Equal Protection Clause, was originally understood as enforcing racial equality with regard to civil rights); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 Geo. Mason U. Civ. Rights L.J. 219 (2009) (same). Thus, just as the Constitution had always prohibited discrimination against the citizens of *other* states in the privileges and immunities of citizenship, the law now prohibited discrimination against any citizen of

the *United States* with regard to those fundamental civil rights.

In sum, the fundamental rights of national citizenship guaranteed by the Privileges or Immunities Clause include *at least* the full civil rights of property and contract protected under state law. *McDonald*, 561 U.S. at 834–35 (THOMAS, J.). These rights were indispensable to the freedpeople. Without them, they could not leave the plantation, reunite their families, and better their economic positions. And though the necessity of that guarantee is admittedly less extreme today, it still stands as an essential benefit of United States citizenship protected under the Fourteenth Amendment.

III. Tennessee Law Violates The Privileges Or Immunities Clause By Denying New Residents Contract And Property Rights Afforded To Other State Citizens.

The invalidity of the Tennessee licensing law inescapably follows from the above.

To begin, the law is, at bottom, a circumscription of certain basic contract and property rights. To complete a retail sale of an "alcoholic spirituous beverage[]," Tenn. Code Ann. § 57-3-204(a), is to execute a contract exchanging rights in personal property, *see, e.g.*, *Ross v. Crow*, 68 Tenn. 420, 420–21 (1877). Moreover, a host of other basic contract and property transactions feed into that ultimate sale. At the very least, a retailer must purchase or rent real estate and acquire and maintain inventory in order to facilitate sales. A retailer may also need to hire employees or independent contractors for ancillary

services. By requiring a retailer's license for alcohol sales, Tennessee has necessarily circumscribed this entire subset of contract and property rights.

More importantly, in denying the license to Tennesseans based on the *duration of their state residency*, the law abridges their fundamental rights as *United States* citizens. As explained above, the fundamental rights of United States citizenship include the right to enjoy local contract and property protections *in any State* as do other citizens *of that State*. The state law at issue here permits the sale of alcohol through a valid retailer's license. But an applicant is not even eligible to be *considered* for a license unless and until he establishes "bona fide residen[cy]" in Tennessee for "the *two-year* period immediately preceding" the date of application. *Id.* § 57-3-204(b)(2)(A) (emphasis added); *see id.* §§ 57-3-204(b)(3)(A)–(B), (D). To renew that same license, an applicant must have maintained Tennessee residency "for *at least ten ... consecutive years*." *Id.* (emphasis added); *see id.* §§ 57-3-204(b)(3)(A)–(B), (D).

The law's clear and explicit terms therefore separate citizens of the United States, as license applicants, into two distinct classes. Some—the preferred, established residents of Tennessee—can apply for an initial license forthwith and renew that license immediately upon its expiration. Others—disfavored newcomers like the Ketchums—must wait two years to apply for the initial license and eight more years for a right to renew. In restricting license eligibility based on residency duration, Tennessee law thus denies the basic rights of mobility and free labor

that the Reconstruction generation fought so nobly to secure.

Neither should that denial go uncorrected by virtue of the subject matter at hand. "A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment." *Whole Women's Health v. Hellerstadt*, 136 S. Ct. 2292, 2329–30 (2016) (THOMAS, J., dissenting). In this case, the duration-of-residency requirement infringes the constitutional right to enjoy state-recognized civil rights, full stop.

This is not to say that *all* duration-of-residency requirements violate the Privileges or Immunities Clause. Again, only those laws bearing on what *nineteenth century Americans* would have understood to constitute *fundamental rights of citizenship* fall within the Clause's ambit. Notably, that order does not include *political* rights—such as voting, holding office, and sitting on juries—which occupied a *separate rung* in the hierarchy of rights as understood by nineteenth-century Americans. Bond, *supra*, at 255–56. States had always discriminated among their own citizens with respect to political rights, most notably suffrage. And the Constitution itself denies citizens the right to hold office on the bases of age and residency. *See* U.S. Const. art. I, § 2, cl. 2; *id.* § 3, cl. 3.; *id.* art. II, § 1, cl. 5. Accordingly—and despite warning from detractors that the Privileges or Immunities Clause was sufficient to do so, *see* Bond, *supra*, at 37—banning racial and sexual discrimination at the ballot box required further revision of the Constitution. *See* U.S. Const. amends. XV, XIX.

In addition to political rights, the Clause quite clearly does not reach *entitlements* such as welfare benefits. *See Saenz*, 526 U.S. at 527 (THOMAS, J.). A share in such public resources would amount to "cotenancy in the common property of the state," *Corfield*, 6 F. Cas. at 552, and thus need not extend to all citizens equally. But when it comes to civil rights of contract and property, the Clause clearly mandates nondiscrimination against United States citizens.

In sum, the law at issue denies United States citizens basic Tennessee contract and property rights solely because they have not lived in the state long enough. In so doing, it necessarily violates the Fourteenth Amendment's Privileges or Immunities Clause.

* * *

Amici acknowledge that much of the forgoing departs from the reasoning and interpretation underlying this Court's Privileges or Immunities Clause jurisprudence. In particular, the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), interpreted the Clause to protect a more limited scope of citizenship rights owing their existence *only* to national law. *See id.* at 74–75.

"Legal scholars agree," however, "that the Clause does not mean what the [*Slaughter-House*] Court said it meant." *Saenz*, 526 U.S. at 522 n.1 (THOMAS, J.). And the effect of the *Slaughter-House* ruling has been to hollow-out the "stronger class of rights" the Fourteenth Amendment guarantees to *citizens* over other persons. Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the*

Fourteenth Amendment, 1 N.Y.U. J. L. & Liberty 1096, 1097 (2005); *see* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & Liberty 334 (2005); *see also* U.S. Const. amend. XIV, § 1 (protecting the "privileges or immunities" of "citizens of the United States," but only prohibiting deprivations of "due process" and "equal protection of the laws" with regard to "any person").

Moreover, "this Court's marginalization of the [Privileges or Immunities] Clause" has not—indeed, *could* not—change the text's true meaning and force, which the Court should consider more deeply now. *McDonald*, 561 U.S. at 809 (THOMAS, J.). After all, "*stare decisis* is only an 'adjunct' of" this Court's "duty ... to decide by [its] best lights what the Constitution means." *Id.* at 812 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 963 (1992) (REHNQUIST, C.J., concurring in judgment in part and dissenting in part)). In this case, text, context, and history supply the "guiding principle[s]" so lacking in this Court's "'fundamental' rights" jurisprudence. *Id.* at 811. Those same guides demand affirmance on Privileges or Immunities grounds.

CONCLUSION

The judgment of the Sixth Circuit should be affirmed on the grounds that the Tennessee law violates the Privileges or Immunities Clause of the Fourteenth Amendment.

Respectfully submitted,

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